10-5-2012

State v. Chongphaisane Appellant's Brief Dckt. 39577

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39577
	)	
v.	)	
	)	
SAIYOTH TOM CHONGPHAISANE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Saiyoth Chongphaisane contends that the district court made several errors in regard to its decision to order him to pay restitution. First, he contends that the district court erroneously allowed the State to include the fringe benefits of employment in its restitution request, even though the relevant statute, I.C. § 37-2732(k), does not authorize restitution awards for such benefits. They are not part of the "regular salaries" because the employee does not receive those benefits based on the actual work done or hours worked. Rather, those benefits are paid regardless, and therefore, are not salary payments, nor were they caused by Mr. Chongphaisane's criminal conduct. Therefore, they cannot be properly included in a restitution award.

Second, Mr. Chongphaisane asserts that the district court abused its discretion in reopening the evidentiary phase of the restitution hearing not once, but three times, to give the State multiple opportunities to supplement the insufficient evidence it elicited at the initial restitution hearing. The district court's decision to reopen the hearing on multiple occasions was beyond the outer boundaries of its discretion because it did not require the State to provide a reasonable excuse for its failure to elicit the evidence at the initial hearing. In fact, the State had rested in that hearing believing it had elicited sufficient evidence to support its claim, and it was only after the district court indicated that it agreed with defense counsel's contention to the contrary that the State decided it wanted to go back and get a second (or third) bite at the apple. As such, the district court's decision to reopen the hearing was an abuse of discretion.

Third, Mr. Chongphaisane asserts that the State failed to meet its *prima facie* burden to prove its restitution request by a preponderance of the evidence. He

contends that the evidence properly presented at the restitution hearing does not constitute substantial evidence. Even with the evidence provided during the first reopening of the case, the State failed to meet that burden. Therefore, the restitution award for the Boise City Police Department (*hereinafter*, BCPD) should be vacated.

Because of these many errors by the district court, Mr. Chongphaisane respectfully requests that the district court vacate the restitution order to the BCPD. Because the errors in this case dealt with the State's initial burden to prove its claims, he requests that the case not be remanded for a new hearing, as that would only give the State a fourth shot at doing what it should have done the first time around. However, if this Court decides that further proceedings are necessary, he respectfully requests limiting instructions so as to ensure the district court does not mistakenly allow in improper evidence which should have been elicited the first time around. He also requests that the State not be allowed to claim the additional time required for any of the witnesses to clarify points as it was the State's error, not his, which would lead to their subsequent testimony. Ultimately, because of the multiple errors, this Court should vacate the restitution order vis-à-vis BCPD in its entirety.

Statement of the Facts and Course of Proceedings

The State charged Mr. Chongphaisane with three counts (one felony, two misdemeanor) of possessing a controlled substance. (R., p.20.) Those charges were based on evidence uncovered during the execution of a search warrant by the police. (*See, e.g.,* Presentence Investigation Report (*hereinafter*, PSI), p.15.)[1] Pursuant to a plea agreement, Mr. Chongphaisane agreed to plead guilty to the felony charge in

[1] PSI page numbers correspond with the page numbers of the electronic PDF file attached thereto (police reports, addendum from rider staff, etc.).

exchange for the State dismissing the two misdemeanor charges. (Tr., Vol.1, p.5, Ls.7-9.)[2] The State also agreed to limit its sentencing recommendation to a unified term of seven years, with two years fixed, subject to a period of retained jurisdiction.[3] (Tr., Vol.1, p.5, Ls.9-12.) Furthermore, the State agreed not to file a sentencing enhancement, although it did reserve the right to request restitution. (Tr., Vol.1, p.5, Ls.12-14.) However, new charges were filed against Mr. Chongphaisane between the change of plea hearing and the sentencing hearing, thus relieving the State of the plea agreement's restrictions. (Tr., Vol.1, p.15, Ls.22-24.)

At the sentencing hearing, the State proffered its initial restitution request for $3,018.21 to be paid to the Idaho State Crime Lab and BCPD. (Tr., Vol.1, p.18, Ls.14-21.) Defense counsel represented that, while Mr. Chongphaisane acknowledged that he should probably be required to pay some restitution, he was of the opinion that the State had insufficiently supported its request and sought more evidence as to the amount claimed. (Tr., Vol.1, p.18, L.22 - p.19, L.5.) As a result, the district court scheduled a hearing on the restitution issue. (Tr., Vol.1, p.19, Ls.19-23.) The parties agreed to proceed to sentencing, and the State recommended a seven-year unified sentence, with two years fixed, but chose not to recommend a period of retained jurisdiction. (Tr., Vol.1, p.22, L.21 - p.23, L.3.) Defense counsel pointed out that Mr. Chongphaisane had been cooperative with the investigation, had expressed his

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[2] The transcripts in this case are contained in two independently-bound and independently-paginated volumes. To promote clarity, the volume containing the change of plea hearing (held on November 16, 2011) and the sentencing hearing (held on January 11, 2012) will be referred to as "Vol.1." The volume containing the restitution hearings (held on February 15, 2012, and March 21, 2012) will be referred to as "Vol.2."

[3] Though the district court ordered a substance abuse evaluation, one was not prepared; however, the parties and the district court determined one was not necessary in this case. (*See, e.g.,* Tr., Vol.1, p.17, Ls.7-22.)

sincere remorse, had accepted responsibility for his action, and had expressed his amenability to treatment. (Tr., Vol.1, p.24, L.5 - p.25, L.24; *see also* Tr., Vol.1, p.26, L.22 - p.27, L.5 (Mr. Chongphaisane expressing the same in allocution).) As a result, defense counsel recommended a period of retained jurisdiction, or alternatively, a fixed sentence of one year,[4] with a recommendation for Mr. Chongphaisane's participation in the prison's therapeutic community program. (Tr., p.26, Ls.1-19.) The district court determined that incarceration was necessary in this case, and so imposed a unified sentence of seven years, with two years fixed, with a recommendation for the therapeutic community or work center programs. (Tr., p.29, L.25 - p.30, L.10; R., pp.44-46.) Mr. Chongphaisane filed a timely notice of appeal from the judgment of conviction. (R., pp.49-51.)

Subsequently, the district court held the hearing regarding restitution. Defense counsel reaffirmed that Mr. Chongphaisane was not opposed to the idea of restitution, but that he was challenging the State's request for payment to BCPD (but not the request for the State Lab). (Tr., Vol.2, p.5, L.17 - p.6, L.6.) The State called two witnesses at the hearing, Officer Steve Keely and Ms. Laura Weddle.[5] Officer Keely testified that his rate of pay was approximately $38 an hour. (Tr., p.17, Ls.3-7.) Also, reviewing State's Exhibit 1, he testified that he had reported that he spent twenty-five hours investigating Mr. Chongphaisane. (Tr., p.8, L.17 - p.9, L.1.) State's Exhibit 1 lists several people who helped with the investigation of Mr. Chongphaisane, and indicates the number of hours each reported toward that investigation. (State's

[4] Defense counsel made no recommendation as to the indeterminate portion of the sentence. (*See generally* Tr., Vol.1, pp.23-26.)

[5] Ms. Weddle assists with crime scene investigation responsibilities and is also responsible for compiling the time sheets for the investigations. (Tr., Vol.2, p.20, Ls.21-25; R., p.57.)

Exhibit 1.)[6] It does not list those employees' rate of pay. (*See* State's Exhibit 1.) Ms. Weddle testified that she would collect the logged hours from each officer and determine which were to be billed as normal hours and which were to be counted as overtime. (Tr., Vol.2, p.23, Ls.19-23.) Then, at some later date (she indicated it was usually quarterly during the year), she would request the officer's "rate of pay and benefits." (Tr., Vol.2, p.24, Ls.5-9.) She indicated that the rate of pay (such as Officer Keely's $38 an hour) "would not include the benefits that we add in for the purposes of restitution." (Tr., Vol.2, p.24, Ls.10-17.) She also testified that her rate of pay was "approximately, I would say, $20 an hour with benefits." (Tr., Vol.2, p.27, Ls.18-21; *but see* Tr., Vol.2, p.28, Ls.2-4 (which suggests the $20 an hour does not include benefits).)

According to Ms. Weddle, those benefits are the normal benefits offered by the employer by virtue of being a full-time employee. (Tr., Vol.2, p.27, Ls.15-17, p.28, Ls.2-6.) Those benefits are given to the employee regardless of exactly what work the employee does and regardless of whether they work overtime. (Tr., Vol.2, p.31, Ls.5-12.) Finally, Ms. Weddle testified that she used the figures provided by the payroll department to calculate the amount the office spent for their time. (Tr., Vol.2, p.25, Ls.2-19; p.32, Ls.6-7.) Neither Officer Keely nor Ms. Weddle testified as to the rates of pay of any of the other employees. (*See generally* Tr., Vol.2, pp.6-32.) The district court reminded the prosecutor that she needed to admit State's Exhibit 1, which the prosecutor did without objection. (Tr., Vol.2, p.32, Ls.13-18.) Ms. Weddle was excused by the district court at that time. (Tr., Vol.2, p.33, Ls.5-7.) The State rested its case regarding restitution without presenting any additional evidence. (Tr., Vol.2, p.33, Ls.1-2.)

[6] State's Exhibit 1 is provided in a separate pdf document, entitled "ChongphaisaneEX."

Defense counsel pointed out that no evidence had been provided as to the rate or pay for any of the employees beside Officer Keely and Ms. Weddle, and so contended that the district court had insufficient evidence to award restitution for those hours. (Tr., Vol.2, p.34, Ls.1-15.) He also contended that the evidence was insufficient to support awards for Officer Keely's and Ms. Weddle's time because the request did not conform to the statute, both because they had not parsed out the reported hours between the investigation of Mr. Chongphaisane and the independent investigations of his codefendants, and because the benefits were improperly being requested as restitution. (Tr., Vol.2, p.34, L.16 - p.36, L.20.) While the district court disparaged defense counsel's arguments in regard to Officer Keely's and Ms. Weddle's rate of pay (Tr., Vol.2, p.36, L.2 - p.37, L.20), it did state "[t]he burden is on the state to prove the basis for its restitution. [Defense c]ounsel has brought up a good point, I did not hear any testimony -- [Ms. Weddle] certainly could have testified as to the rate, but I don't remember -- maybe . . . ." (Tr., Vo.2, p.43, L.21 - p.44, L.2.) The prosecutor interjected at that point and admitted: "Your Honor, I did not elicit the dollar figure per officer. I asked [Ms. Weddle] if she had those figures in front of her and applied them accurately as to the number of hours the officers provided. If Your Honor does not think that is sufficient, I would move to reopen." (Tr., Vol.2, p.44, Ls.3-8.) The district court allowed the State to reopen its case regarding restitution. (Tr., Vol.2, p.44, L.9.)

The prosecutor recalled Ms. Weddle, who testified she did not have the information regarding the other officers' rate of pay with her. (Tr., Vol.2, p.45, Ls.12-15.) She then proceeded to guess and approximate what those other officers' rate of pay might be, based only on a comparison to Officer Keely's rate of pay. (*See* Tr., Vol.2, p.46, L.8 - p.49, L.3.) Additionally, in response to questioning by the district court,

Ms. Weddle admitted that the numbers she used could have been erroneous, since she got them several weeks after the officers reported the hours they had logged on that investigation, and any or all of the officers could have received raises in the interval. (*See* Tr., Vol.2, p.52, L.4 - p.53, L.4.) The district court took the matter of restitution under advisement. (Tr., Vol.2, p.56, Ls.17-19.)

The State subsequently sought to bolster its argument further and submitted the first of two affidavits by Ms. Weddle.[7] (R., pp.57-61.) Mr. Chongphaisane objected on the grounds that the evidence was proffered untimely, in that the evidentiary period of the hearing had closed, and that the February affidavit violated Mr. Chongphaisane's constitutional rights to confront adverse witnesses. (R., pp.62-63.) The district court scheduled a hearing to allow Mr. Chongphaisane to cross-examine Ms. Weddle's statements in the affidavit. (R., p.65; Tr., Vol.2, p.57, Ls.10-15.) Even though Mr. Chongphaisane indicated that he did not want a hearing on the matter, the district court insisted, and informed Mr. Chongphaisane that it would tack on an additional restitution award for the time Ms. Weddle spent at that hearing. (Tr., Vol.2, p.57, Ls.13 - p.58, L.5, p.60, Ls.11-20.) Defense counsel objected to that decision, arguing that the district court could have ruled on the objection to the affidavit without forcing Ms. Weddle to be present. (Tr., Vol.2, p.62, L.20 - p.63, L.63.) Defense counsel's argument appears to be that, regardless of whether a subsequent opportunity to cross-examine Ms. Weddle, the fact that the district court considered the affidavit at all

[7] The first of Ms. Weddle's affidavits was filed on February 21, 2012, and will be referred to as "February Weddle Affidavit." (R., pp.57-61.) Her second affidavit was filed on March 26, 2012, and will be referred to as "March Weddle Affidavit." (Augmentation - March Weddle Affidavit.)

violated Mr. Chongphaisane's constitutional right in that regard. (*See* Tr., Vol.2, p.60, L.21 - p.65, L.5.)

However, the district court concluded that the only way for Ms. Weddle's presence to be unnecessary would be if Mr. Chongphaisane dropped his objection. (Tr., Vol.2, p.64, Ls.12-14.) Defense counsel did not concede the objection. (*See* Tr., Vol.2, p.65, Ls.19-25.) The hearing ended without a discussion of Mr. Chongphaisane's other objection regarding the timeliness of the proffer of evidence. (*See generally*, Tr., Vol.2, pp.57-66.) On March 26, 2012, Ms. Weddle submitted her second affidavit, which stated "[i]n compliance with the Court's order on March 22, 2012, I am hereby providing the time spent in hearing and/or preparation for [the restitution hearings]. I have included our rates of pay and the total financial figure attributable to our appearances in court on those two dates." (Augmentation – March Weddle Affidavit, p.2.) Ms. Weddle provided evidence regarding her time as well as Officer Keely's. (Augmentation – March Weddle Affidavit.) However, the record does not indicate that the district court issued an order on March 22, 2012. (*See generally* R.; *see also* Online Repository.) The closest the record comes to indicating an order from the district court in this regard is the district court's statements at the hearing on March 21, 2012: "I can take judicial notice of the time that was spent here and I will use the underlying figure that's presented in the affidavit to determine how much the additional costs for restitution should be." (Tr., Vol.2, p.60, Ls.14-20.) The State's total request for BCPD, after all the reopenings of the restitution hearing, was for $3,061.24. (Augmentation – March Weddle Affidavit, p.5.)

The district court subsequently entered a written judgment on the issue of restitution. (Augmentation – Restitution Order.) It determined that it could, in its

discretion, reopen a matter and take additional evidence, even on its own motion. (Augmentation – Restitution Order, p.2.) It decided that the fringe benefits could be included in the officers' regular salaries. (Augmentation – Restitution Order, p.3.) Citing *State v. Mosqueda*,[8] it determined that the State did not have to break the investigation down based as to which defendant was being investigated and that the time spent in the hearings was also properly included in a restitution award. (Augmentation – Restitution Order, p.4.) Finally, it determined that, because Mr. Chongphaisane was young, and the district court presumed he would be able to work upon release, and so, it would impose the entire award requested. (Augmentation – Restitution Order, pp.4-5.) Ultimately, the district court filed the Order for Restitution and Judgment, which awarded $2,918.21 to BCPD and $100.00 to the Drug Enforcement Donation Account. (Augmentation – Order and Judgment.) Mr. Chongphaisane filed a timely amended notice of appeal from that order to include the restitution order in his appeal. (Augmentation – Notice of Appeal.)

[8] 150 Idaho 830, 833-36 (Ct. App. 2010); *reh'g denied, rev. denied.*

ISSUES

1. Whether the district court erred by allowing the State to include the fringe benefits of employment in the calculation of "regular salaries" at the restitution hearing.

2. Whether the district court abused its discretion by reopening, not once, but three times, the restitution hearing as the State provided no valid justification to reopen the hearing so as to present additional evidence which it could have, but did not present during the initial hearing.

3. Whether the district court erred in awarding restitution in this case because there was insufficient evidence to support the restitution award.

ARGUMENT

I.

The District Court Erred By Allowing The State To Include The Fringe Benefits Of Employment In The Calculation Of "Regular Salaries" At The Restitution Hearing

A. Introduction

When considering whether to award restitution, the district court is limited to award amounts sufficient to cover the economic loss actually caused by the defendant's criminal conduct. Idaho Code § 37-2732(k) sets forth a specific subset of losses for which the State can claim restitution. It includes the regular salaries of employees for the time spent investigating the defendant's criminal conduct. The regular salaries do not, however, include the fringe benefits of employment. Nevertheless, the evidence reveals that the State incorrectly added in those benefits when it sought restitution in this case. Because those benefits are not properly included in a restitution claim, the district court erred in ordering the restitution claimed by the State. As such, this Court should vacate the restitution order in regard to BCPD.

B. The Fringe Benefits Are Not Part Of The Officers' Regular Salaries And, Therefore, Are Not Properly Included In A Restitution Award

The issue of whether fringe benefits were not properly included in a restitution award pursuant to I.C. §37-2732(k) was preserved in this case. (*See, e.g.*, Tr., Vol.2, p.34, L.16 - p.37, L.20.) The standards governing the scope of restitution pursuant to I.C. § 37-2732(k) are the same as those established for I.C. § 19-5304. *State v. Gomez*, 125 Idaho 253, 258 (2012). ""[T]he restitution statute is not so broad, however, as to authorize compensation for *every* expenditure that a victim may personally deem reasonable or necessary as a response to a crime." *State v. Card*,

146 Idaho 111, 114 (Ct. App. 2008). Nor does it authorize restitution for every out-of-pocket expense suffered but for the defendant's crime. *State v. Gonzales*, 144 Idaho 775, 776 (Ct. App. 2007). Rather, restitution awards under I.C. § 19-5304 are limited to only those losses caused by the defendant's criminal conduct. *See, e.g., State v. Corbus*, 150 Idaho 599, 602 (2011); *State v. Nienburg*, 283 P.3d 808, 812 (Ct. App. 2012), *reh'g denied.* Additionally, "the State bears the initial burden to make a *prima facie* showing . . . that the expenses were reasonable and necessary to treat injuries caused by the defendant's criminal conduct." *Card*, 146 Idaho at 114-15; *see also State v. Smith*, 144 Idaho 687, 692 (Ct. App. 2007). That *prima facie* burden is measured against a preponderance of the evidence standard which requires the amount of restitution to be supported by substantial evidence. *In re Doe*, 146 Idaho 277, 283-84 (Ct. App. 2008). Therefore, where the State fails to make the *prima facie* showing that the expenses were reasonably necessary to deal with the losses incurred as a result of defendant's criminal conduct, a restitution award pursuant to I.C. § 37-2732(k) is erroneous.

Specifically, I.C. § 37-2732(k) provides:

> Upon conviction of a felony or misdemeanor violation under this chapter or [other specific code sections], the court may order restitution for costs incurred by law enforcement agencies in investigating the violation. . . . Costs shall include, but not be limited to, those incurred for the purchase of evidence, travel and per diem for law enforcement officers and witnesses throughout the course of the investigation, hearings and trials, and any other investigative or prosecution expenses actually incurred, including regular salaries of employees.

Id. By using that particular language, the Legislature inherently limited the types of pay that could be recouped under this code section because "[i]t is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others.'" *See, e.g., Local 1494 of Int'l Ass'n*

of Firefighters v. City of Couer d'Alene, 99 Idaho 630, 639-40 (1978) (quoting *Peck v. State*, 63 Idaho 375 (1941)). Therefore, if the loss is not properly included within the terms listed in the statute, they are excluded from the scope of the statute. Specifically at issue here is what expenses the statute includes by using the term "salary." Terms in a statute are given their commonly understood definitions, and if a statute is unambiguous, the courts must give effect to the unambiguous language of the statute. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895-96 (2011).

The term "salary" is defined as "[a]n agreed compensation for services usu[ally] paid at regular intervals on a yearly basis, as distinguished from an hourly basis. Cf. wage." BLACK'S LAW DICTIONARY, 631 (3rd pocket ed. 2006). A "wage" is "[p]ayment for labor or services, usu[ally] *based on the time worked or quantity produced.*" BLACK'S LAW DICTIONARY, 767 (3rd pocket ed. 2006) (emphasis added). This is consistent with the way the Legislature has defined the term in a similar context:

> (A) "Salary" means:
>
> (a) The total salary or wages paid to a person who meets the definition of employee by an employer for personal services performed and reported by the employer for income tax purposes, including the cash value of all remuneration in any medium other than cash. . . .
>
> (C) "Salary" does not include: . . .
>
> (b) Lump sum payments inconsistent with usual compensation patterns made by the employer to the employee only upon termination from service including, but not limited, vacation payoffs, sick leave payoffs, early retirement incentive payments and bonuses. . . .
>
> (d) Employer payments to employees for or related to travel, mileage, meals, lodging or subsistence expenses . . . .[9]

[9] Because the Legislature expressly wanted to include those costs which are identified as "not salary" in subsection (d) in the restitution permissible pursuant to I.C. § 37-2732(k), it specifically listed them in the statutory language. *See* I.C. § 37-2732(k). It did not, however, include the fringe benefits that are not salary, and so those benefits

I.C. § 59-1302(31). In fact, the Legislature has, in other contexts, drawn a clear distinction between "salary" and "benefits":

> 4. "Compensation" means salary and benefits for the professional employee.
> 5. "Benefits" is limited to employee insurance, leave time and sick benefits.

I.C. § 33-1272. Had the Legislature intended the officers' fringe benefits to be included in the restitution available pursuant to I.C. § 37-2732(k), it would have used the term "compensation" (the term which includes both salary *and* benefits), as opposed to just the term "regular salaries." The term "regular salaries" does not include the fringe benefits of employment.

Nevertheless, according to Ms. Weddle, the fringe benefits the State is trying to claim are not based on the services the employee provides or the actual hours the employee works. (*See* Tr., Vol.2, p.31, Ls.9-12 ("Q. And those benefits are made to [Officer Keely] regardless of exactly who [he] investigates or what he investigates; correct? A. True. Q. And his benefits are paid to him regardless of whether he works overtime or not; correct? A. True.").) Since the requested benefits are not contingent on the work done or time spent (*i.e.*, awarded based on the time worked or quantity produced), they are not part of the officers' wages, and thus, not a part of the officers' regular salaries. In fact, Ms. Weddle admitted that the benefits are not part of the officers' rate of pay (*i.e.*, regular salaries), but are especially added to the salaries when the State prepares a restitution request. (Tr., Vol.2, p.24, Ls.16-17.) As such, those

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cannot be properly claimed pursuant to I.C. § 37-2732(k). *See, e.g., Local 1494 of Int'l Ass'n of Firefighters*, 99 Idaho at 639-40.

benefits cannot properly be awarded pursuant to I.C. § 37-2732(k). Not every loss is recoverable as restitution. *See, e.g., Card*, 146 Idaho at 114.

Additionally, the other language in the statute identifies activities specifically related to the investigation of a particular case (*i.e.*, caused by the defendant's criminal conduct) in defining what losses are recoverable. I.C. § 37-2732(k) (listing, for example, "investigating *the violation*," "purchase of the evidence," "throughout *the course of the investigation*" (emphasis added)). This particular language employed by the Legislature demonstrates that only the losses incurred through the investigation of the particular offense are recoverable, thereby, effectively excluding other costs incurred that were not associated with the *investigation* of the defendant's criminal act (*i.e.*, not caused by the defendant's criminal actions). *See Local 1494*, 99 Idaho at 639-40. As such, a restitution award for those benefits, an expense not incurred as part of the investigation into the defendant's criminal acts, is wholly improper under the language of the statute.

Specifically in this case, the evidence revealed that the officers whose salaries are claimed in restitution receive those fringe benefits regardless of which case they investigate at a particular time or how long they work on that investigation. (Tr., Vol.2, p.31, Ls.5-7.) As such, the State's loss in that regard is not, in any sense, caused by the defendant's criminal conduct. The State will suffer that loss regardless of who or what the officer investigates or how long he investigates. Therefore, the State failed to meet its *prima facie* burden to show that those benefits were somehow incurred as a result of Mr. Chongphaisane's criminal conduct or that those benefits fit under the terms used in the statute. Therefore, the restitution award pursuant to I.C. § 37-2732(k) was erroneously issued.

II.

The District Court Abused Its Discretion By Reopening, Not Once, But Three Times, The Restitution Hearing As The State Provided No Valid Justification To Reopen The Hearing So As To Present Additional Evidence Which It Could Have, But Did Not Present During The Initial Hearing

A. Introduction

The State failed to present any evidence at all during the evidentiary portion of the initial hearing in regard to all but two of the employees for whom it was claiming restitution. It had even excused the witness who could have provided some insight on that point. It believed that it had presented sufficient evidence to support its claim. Only after the district court indicated that it agreed with defense counsel, who argued that the State could not recover restitution without providing that evidence, did the State decide that it wanted to present more evidence on that matter. Nevertheless, the district court allowed the evidentiary portion of the hearing to reopen not once, but three times, so the State could put forth more evidence in an effort to support its restitution claims (though, even with that second bite at the apple, the State's evidence was still insufficient and it had to try two more times). Reopening the hearing as it did constitutes an abuse of the district court's discretion.

B. The District Court Abused Its Discretion When It Reopened The Evidentiary Hearing Without Good Cause Offered By The State

Motions to reopen a hearing are decided in the discretion of the district court. *State v. Babb*, 125 Idaho 934, 941 (1994). That discretion is analyzed through a three-step analysis: did the district court perceive its discretion, did it act within the outer bounds of that discretion, and did it make that decision in an exercise of reason. *See, e.g., State v. Hedger*, 115 Idaho 598, 600 (1989). In this case, the district court did

perceive its discretion: "I have the inherent authority to reopen an evidentiary hearing to allow the Court to received additional information . . . ." (Tr., Vol.2, p.58, Ls.11-12.) However, its decision to reopen the hearing was not within the outer bounds of its discretion, nor reached through an exercise of reason.

The Idaho Supreme Court has established the prerequisite that is necessary before reopening a hearing will be within the district court's discretion: "Before a case is reopened, some reasonable excuse such as oversight, inability to produce or ignorance of the existence of the evidence *must be established by the moving party*." *Smith v. Smith*, 95 Idaho 477, 481 (1973) (emphasis added). Because the State is the party that was seeking to have the hearing reopened, it bore the burden to establish the reasonable excuse. (*See, e.g.,* Tr., Vol.2, p.44, Ls.3-8.)

This rule is well established in the historical precedent of this State. *See, e.g., Griffen v. City of Lewiston*, 6 Idaho 231, 55 P. 545, 551 (1898) (establishing the prerequisite in 1898). For example, where the moving party at the initial hearing was aware of and actually had the evidence it hoped to present in the reopened hearing, reopening the hearing was inappropriate, as that party should have presented that evidence during the initial hearing. *Froman v. First Nat'l Bank*, 35 Idaho 10, 204 P. 145, 146 (1922). In the absence of a claim of fraud on the part of the non-moving party, the moving party "is now estopped" from presenting that evidence (of which the moving party was aware and had available to it) to bolster its position after the close of evidence. *Id.* at 146. Even if it is necessary to reopen a hearing, the district court is more likely to abuse its discretion if it allows the moving party to reopen their case-in-chief. *See King v. Mattingly*, 49 Idaho 618, 292 P. 220, 221 (1930) (recognizing that, while finding no abuse of discretion in reopening the case, "[a]ppellant *did not ask to*

reopen his case in chief, and made no offer to attack the certificate admitted. But he sought to introduce evidence *on a totally different line*." (emphasis added)). Additionally, requests to reopen a hearing necessarily must be made after the time the parties submit the case for a decision, but before the district court enters judgment. *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049, 1052 (1931).

Specifically, the requirement for a reasonable excuse is derived from *Griffen*, 6 Idaho 231, 55 P. at 551 (1898). *Smith v. Smith*, 95 Idaho 477, 481 (1973). The term "oversight" in this context has been subsequently interpreted to apply to situations where certain evidence is prepared for a hearing, actually presented or otherwise used at that hearing, but by mistake (*i.e.*, oversight), is not actually admitted into evidence. *See, e.g., Robert V. DeShazo & Associates v. Farm Mgmt Services, Inc.*, 101 Idaho 154, 154 (1980); *Bank of Idaho v. Colley*, 103 Idaho 320, 324 (Ct. App. 1982). It does not extend to a situation where the moving party just does not prepare the information properly for the hearing or fails to present it at the hearing. *See, e.g., Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, ___ Idaho ___, 283 P.3d 757, 775-76 (2012), *reh'g denied*. That is not a reasonable excuse, and that is what happened in this case: according to defense counsel, "there's been no evidence tendered today or at any other time about what [most of the officers'] rate of pay is . . . ." (Tr., Vol.2, p.34, Ls.5-15.) The district court noted that "[Defense c]ounsel has brought up a good point, I did not hear nay testimony [in that regard. Ms. Weddle] certainly could have testified to that rate . . . ." (Tr., Vol.2, p.43, Ls.21-24.) Therefore, because the State failed to present that evidence at all, the excuse of oversight is unavailable to justify the reopening of the hearing. *See, e.g. Printcraft*, ___ Idaho ___, 283 P.3d at 775-76; *DeShazo*, 101 Idaho at 154; *Colley*, 103 Idaho at 324.

The reason the district court's discretion to reopen has, and continues to be, limited by this perquisite is that the decision to reopen a hearing without a reasonable excuse disregards "the principles of justice." *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 826 (1991). By limiting reopenings of hearings, courts "protect the integrity of the [hearing] and encourage[] the parties to marshall [sic] their evidence in a timely fashion." *Tucek v. Huff*, 115 Idaho 905, 907 (Ct. App. 1985). Notably, an attorney's misunderstanding about the nature of the hearing, which impacted his decision as to when such evidence would be presented, does not constitute oversight, inability to present evidence, or ignorance of the evidence sufficient to establish a reasonable excuse to permit the reopening of the hearing. *Printcraft*, 283 P.3d at 775-76; *compare State v. Huggins*, 103 Idaho 422, 427-28 (Ct. App. 1982), *overruled on other grounds by* 105 Idaho 43, 45 (1983) (actual misunderstanding of the elements of the offense, resulting in the failure to present evidence on some elements of the offense, constitutes a reasonable excuse to permit reopening of the criminal case specifically to allow for presentation of evidence on those issues). Additionally, if the proposed evidence would not actually cure the deficiency in the evidence, that is another reason to leave the hearing closed.[10] *Allen v. Burggraf Const. Co.*, 106 Idaho 451, 454 (Ct. App. 1984).

Essentially, the district court abuses its discretion when it reopens a hearing after both parties have been given a full and fair opportunity to present evidence on the issue and provide argue to the fact-finder on that point. *Cheh v. EG&G Idaho, Inc.*, 150 Idaho

[10] As will be discussed in Section III(B), *infra*, the evidence elicited during the first reopening consisted of approximations and guesswork, and as such, is insufficient to justify the restitution award. Therefore, the proffered evidence did not cure the inconsistency, demonstrating another reason the district court's decision to reopen the hearing constituted an abuse of discretion. *Compare Allen*, 106 Idaho at 454.

62, 67 (2010). Therefore, as *Printcraft* and *Huggins* reveal, the outer limit of the district court's discretion to reopen a hearing is that it has the discretion to reopen the hearing once the moving party has provided some reasonable justification as to why it had not presented any evidence on a particular point. *Printcraft*, ___ Idaho ___, 283 P.3d at 775-76; *Huggins*, 103 Idaho at 427-28.

In this case, the district court erroneously allowed the State to reopen its case-in-chief in regard to its restitution claim not once, but three times, to present additional evidence to bolster the claim it had already presented during a full and fair hearing. The State was not required to provide a reasonable excuse that would justify reopening the hearing. As such, the district court's decisions to reopen the evidentiary portion of the hearing were all beyond the outer limit of its discretion. Additionally, because there was no reasonable excuse that the State could claim, based on the facts of this case, the district court's decisions to reopen the hearing were also not reached through an exercise of reason.

1. The District Court Abused Its Discretion By Reopening The Evidentiary Portion Of The Hearing To Allow The State To Further Examine Ms. Weddle After The State Had Rested Its Case-In-Chief

The State's first request to reopen the evidentiary phase of the proceedings followed the district court's statements, indicating that it believed the State had presented insufficient evidence with regard to most of the employees' rates of pay. (Tr., Vo.2, p.43, L.21 - p.44, L.8.) The State had already had an opportunity to examine Ms. Weddle on this issue, and had, in fact, done so as to Officer Keely. (*See, e.g.*, Tr., Vol.2, p.24, L.10 - p.25, L.1.) It could have done the same in regard to the other officers at that time, but it had decided that it did not need to: "Your Honor, I did not elicit the dollar figure per officer. I asked [Ms. Weddle] if she had those figures in front

of her and applied them accurately as to the number of hours the officers provided. If Your Honor does not think that is sufficient, I would move to reopen." (Tr., Vol.2, p.44, Ls.3-8.) This statement reveals that the prosecutor had felt the evidence she had elicited was sufficient to support her claim, yet after defense counsel argued it was insufficient and the district court started to agree with defense counsel (*i.e.*, make a ruling), only then did she try to reopen the evidentiary portion of the hearing and elicit additional information of which she had been aware and able to question about originally.

The situation in this case is nearly identical to the situation the Idaho Supreme Court considered in *Printcraft.* Printcraft rested its case without presenting evidence regarding its losses (*i.e.*, appropriate punitive damages). *Printcraft*, ___ Idaho ___, 283 P.3d at 775. The jury was instructed as to appropriate punitive damages. *Id.* Printcraft then realized it should have presented additional evidence on that point. *Id.* The Idaho Supreme Court found that it would have been improper to reopen the case after Printcraft rested without discussing that evidence, or even requesting guidance from the court on that matter. *Id.* The only excuse offered by Printcraft was that it intended to present the evidence at a later time. *Id.* The Idaho Supreme Court found that was not a reasonable excuse (not oversight, not an inability to present the evidence, and not ignorance of the evidence), and so concluded that the district court properly left the matter closed. *Id.* at 775-76.

Similarly, in Mr. Chongphaisane's case, the State rested without presenting evidence regarding various losses. As such, defense counsel argued for an appropriate award based on the evidence presented. The State then learned that it should have presented additional evidence on that point. The State did not assert that it had failed to

get the evidence admitted due to oversight.[11] *Compare DeShazo*, 101 Idaho at 154; *Colley*, 103 Idaho at 324. It did not contend that the evidence was unavailable for presentation. *Compare Allen*, 106 Idaho at 454. Its statement to the district court demonstrates that the State was not ignorant of the evidence. (*See* Tr., Vol.2, p.44, Ls.3-8.) The State did not even have the excuse Printcraft offered (that it had been intending to present that evidence at a later time in the proceedings). Rather, the prosecutor indicated that it had not planned on presenting that evidence at all, but that it had been satisfied with the presentation it had already made. (Tr., Vol.2, p.44, Ls.3-8.) That is not a reasonable excuse, as it does not constitute oversight (as the term has been defined in this area of the law), nor was it an inability to present the evidence, nor ignorance of the evidence. *Compare, e.g., Printcraft*, ___ Idaho ___, 283 P.3d at 775-76; *DeShazo*, 101 Idaho at 154; *Colley*, 103 Idaho at 324; *Allen*, 106 Idaho at 454. Therefore, like in *Printcraft*, the hearing should have stayed closed. By reopening the hearing the first time without a reasonable excuse from the State, the district court abused its discretion. *See, e.g., Printcraft*, ___ Idaho ___, 283 P.3d at 775-76; *Ohman*, 120 Idaho at 826; *Tucek*, 115 Idaho at 907.

2. The District Court Abused Its Discretion When It Reopened The Evidentiary Portion Of The Restitution Hearing To Consider The February Weddle Affidavit After The State Had Rested And The Hearing Had Concluded

Just as with the first reopening, the district court abused its discretion by reopening the hearing a second time to permit the February Weddle Affidavit to be

[11] Rather, the State's only exhibit had been admitted, even though the district court had to remind the State to move for its admission. (Tr., Vol.2, p.32, Ls.13-18.) Had Exhibit 1 not been admitted, that would have constituted oversight. *See DeShazo*, 101 Idaho at 154; *Colley*, 103 Idaho at 324 However, the decision that sufficient evidence had been presented, and thus, the decision to rest does not. *See id.*; *compare Printcraft*, 283 P.3d at 775-76.

admitted because, just as before, the State did not provide a reasonable excuse as to why that evidence had not been presented during the initial hearing. (*See generally* Tr., Vol.2, pp.57-66; R., pp.57-58.) Mr. Chongphaisane objected to the use of this affidavit on two grounds: (1) "Because the State has already rested its case, any information contained in the Affidavit is untimely and should not be considered by the Court"; and (2) on Sixth Amendment Confrontation Clause grounds. (R., p.63.) In fact, the only reason given in Ms. Weddle's affidavit for the additional information is to supplement her testimony from the original hearing. (R., p.58.) There was no claim that there had been oversight, an inability to present that evidence, or ignorance of that evidence at the initial hearing. (*See generally* Tr., Vol.2, pp.57-66; R., pp.57-58.) Therefore, as with the first reopening of the hearing, the district court abused its discretion to reopen the evidentiary hearing and allow in Ms. Weddle's first affidavit. *See, e.g., Printcraft*, 283 P.3d at 775-76; *Ohman*, 120 Idaho at 826; *Tucek*, 115 Idaho at 907.

3. The District Court Abused Its Discretion When It Reopened The Evidentiary Portion Of The Restitution Hearing To Consider The March Weddle Affidavit After The State Had Rested And The Hearing Had Concluded

Finally, the Court, *sua sponte*,[12] reopened the evidentiary portion of the hearing yet again in order to have Ms. Weddle present more evidence as to the value of her and Officer Keely's time to testify at the restitution hearings. (*See* Tr., Vol.2, p.57, Ls.12-15.)

[12] Assuming that the March Weddle Affidavit is accurate in Item 4, the fact that the district court ordered Ms. Weddle to provide it with additional information demonstrates that this decision to reopen the evidentiary portion of the hearing was made by the district court *sua sponte*. (Augmentation – March Weddle Affidavit, p.2 ("In compliance with the Court's order on March 22, 2012[,] I am hereby providing the time spend in hearing and/or preparation for hearing. . . .") Alternatively, if the March Weddle Affidavit is inaccurate in Item 4, it should not be considered at all, as it would be inherently untrustworthy.

Again, no reasonable excuse was given as to why this evidence had not been presented at the initial hearing, or even in either of the previous two reopening. This is particularly true in regard to Officer Keely's time at the first hearing, as Ms. Weddle had already prepared and submitted an affidavit which could have included that information. (*See* R., pp.57-58.) Therefore, the district court's decision to reopen the evidence as to the State's restitution request for a third time constituted an abuse of its discretion. *See, e.g., Printcraft*, 283 P.3d at 775-76; *Ohman*, 120 Idaho at 826; *Tucek*, 115 Idaho at 907.

III.

The District Court Erred In Awarding Restitution In This Case Because There Was Insufficient Evidence To Support The Restitution Award

A. Introduction

As the district court erroneously reopened the restitution hearing on multiple occasions, the restitution award could only be properly based on the evidence presented during the evidentiary hearing. That evidence is insufficient to support an award for the salaries of anyone besides Officer Keely and Ms. Weddle. However, even the evidence regarding the restitution claim for the salaries of Officer Keely and Ms. Weddle was insufficient. Because the restitution award to BCPD purports to award restitution on insufficient evidence, it is erroneous and should be vacated.

B. The District Court Inappropriately Awarded Restitution Based On Insufficient Evidence

As restitution may only be awarded for the actual economic loss suffered by the victim, the State has a *prima facie* burden to establish the actual amount of that loss through substantial evidence. *Doe*, 146 Idaho at 283-84. Whether the evidence is sufficient to meet that standard is measured by a preponderance of the evidence. *Id.* at

284. Where the evidence fails to meet that standard, a restitution award cannot be premised on that evidence. *See State v. Johnson*, 149 Idaho 259, 267 (Ct. App. 2010) (holding that, where the State failed to present substantial evidence as to the value of the copper wire at issue, the district court erred by ordering restitution based only on that insufficient evidence).

In this case, the State only properly presented evidence of the hours worked and the rate of pay for Officer Keely's and Ms. Weddle's investigative efforts. (*See, e.g.,* State's Exhibit 1 (indicating that Officer Keely spent twenty-five hours on this case and that Ms. Weddle spent eleven and one-half hours of regular time, as well as six and one-half hours of overtime, on this case); Tr., Vol.2, p.17, Ls.6-7 (Officer Keely testifying that his rate of pay was approximately $38 an hour); Tr., Vol.2, p.27, Ls.27 (Ms. Weddle testifying that her rate of pay was approximately $20 an hour).[13]) However, no testimony was provided regarding the pay rates of any of the other officers and the State's Exhibit 1 does not contain that information either. (*See generally* Tr., Vol.2, pp.5-43; State's Exhibit 1.) As such, both defense counsel and the district court correctly noted, the State presented no evidence as to the rate of pay for the other officers, and so failed to meet its *prima facie* burden in regard to its claims for the salaries of those other officers. (Tr., Vol.2, p.34, Ls.5-15, p.43, L.21 - p.44, L.1.) Because the State failed to present the necessary substantial evidence and meet its *prima facie* burden, restitution cannot be properly awarded in that regard. *See, e.g., Johnson*, 149 Idaho at 267.

[13] Though the record is not clear as to whether that estimation erroneously includes the fringe benefits. (*Compare* Tr., Vol.2, p.27, Ls.18-21 ("approximately, I would say, $20 an hour with benefits") *with* Tr., Vol.2, p.28, Ls.2-4 (which suggests the $20 an hour does not include benefits).)

Furthermore, the fact that neither Officer Keely nor Ms. Weddle could provide anything other than approximations of their rates of pay reveals that there is not substantial evidence to support a restitution award for their regular salaries either. (*See* Tr., Vol.2, p.17, Ls.6-7; Tr., Vol.2, p.27, Ls.27.) Specifically to Ms. Weddle, she testified that the number she gave included the fringe benefits of employment. (Tr., Vol.2, p.17, Ls.20-21.) As explained in Section I(B), *supra*, those benefits are not properly included in restitution pursuant to I.C. § 37-2732(k), and therefore, the evidence as to Ms. Weddle's rate of pay is artificially and improperly inflated. Therefore, there is not substantial evidence upon which the restitution award for her regular pay could be based.[14]

Furthermore, Ms. Weddle testified as to the procedure she used to calculate how much money was paid to each officer for their work in a particular investigation:

> Q. Where did you get the information about how long each of those officers worked in regard to this case?
> A. Typically, the day after the search warrant I will e-mail the team members and ask them to provide me with a number of hours they spend on this search warrant and I delineate which would be regular or overtime
> Q. Do you, then, have some access to their current rate of pay that you apply to the numbers that they provide you?
> A. Yes I do.

[14] As a note, should this Court decide to remand this case for a new restitution hearing rather than just vacate the restitution order to BCPD in its entirety based on the State's failure to present sufficient evidence to support the claim, the district court should be instructed that it cannot order Mr. Chongphaisane to pay for Ms. Weddle's time to clarify that issue. Such an order would be vindictive, increasing the penalty after Mr. Chongphaisane successfully exercised his appellate rights. *See, e.g., State v. Grist*, 152 Idaho 786, 793 (Ct. App. 2012). For the same reason, the district court should be instructed that it cannot consider the salaries of anyone besides Officer Keely and Ms. Weddle, as the State already had the opportunity to present that claim and it failed in that regard, as Mr. Chongphasiane would have demonstrated on appeal. Reopening the hearing for a fourth time to give the State a fourth bite at the apple would be improper. *See, e.g., Printcraft*, 283 P.3d at 775-76. Mr. Chongphaisane believes such an instruction would help to foreclose the possibility that the district court would mistakenly hold an overly-broad hearing on remand, leading to a second appeal and waste of judicial resources.

Q. How do you get the numbers for their rate of pay?
A. Approximately quarterly during the year I send a list of our officers in our unit to our payroll department and they supply me with the rate of pay, regular and overtime, which includes the rate of pay and benefits.

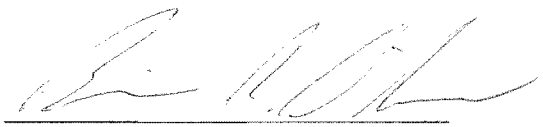
(Tr., Vol.2, p.23, L.16 - p.24, L.9.) Notably, Ms. Weddle did not get the officer's rate of pay at the time they were working on the investigation, but at some, unknown future point. More importantly, Ms. Weddle admitted that any or all of the officers could have received raises in the interim. (*See* Tr., p.53, Ls.1-4.) That means if Officer A received a raise after investigating Mr. Chongphaisane, but before Ms. Weddle requested his pay rate, the restitution figure would be higher than the State's actual loss. Therefore, even when properly restricting the restitution award to just the officer's regular salaries, the State failed to prove its restitution claim, and therefore, the district court erred when it entered that award.

Even after the district court erroneously allowed the State to reopen and present evidence the first time, the State still failed to meet its *prima facie* burden in this regard. The totality of the State's evidence presented at the reopened hearing was speculation and guesswork, based on a comparison to Officer Keely's rate of pay via the officers' call numbers. (Tr., Vol.2, p.45, L.19 - p.49, L.3.) These approximations do not establish the losses suffered by the State by a preponderance of the evidence because those approximations are not substantial evidence. *See Doe,* 146 Idaho at 283-84; *compare Johnson*, 149 Idaho at 267. Therefore, as the State failed to meet its burden to present sufficient evidence as to its loss, the restitution award for BCPD based on that evidence was erroneously entered.

CONCLUSION

Mr. Chongphaisane respectfully requests that this Court vacate the restitution order to BCPD in his case. If this Court determines that the issue needs to be remanded for further proceedings, he respectfully requests that the order be accompanied by instructions properly limiting the scope of those subsequent proceedings.

DATED this 5th day of October, 2012.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

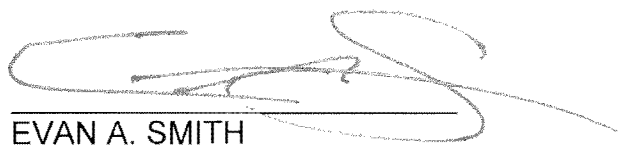
I HEREBY CERTIFY that on this 5th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SAIYOTH TOM CHONGPHAISANE
INMATE #60534
SICI
PO BOX 8509
BOISE ID 83707

CHERI C COPSEY
ADA COUNTY DISTRICT COURT
E-MAILED BRIEF

MICHAEL W LOJEK
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

BRD/eas